IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA, **Plaintiff,** **v.** **DANIEL J. BALDI,** **Defendant.**	**Case No. AGCR259613** **RULING ON DEFENDANT'S MOTION TO DISMISS**

On October 8, 2012 the State filed a Trial Information in this matter. On June 17, 2013 Defendant filed a Motion to Dismiss all charges against him. On August 22, 2013 the State filed its Resistance and the Court held a contested hearing on the matter. Having considered the court file, motion, resistance, subsequent filings of the attorneys, and counsels' arguments, the Court enters the following ruling.

I. BACKGROUND FACTS AND PROCEEDINGS

Defendant Daniel Baldi was a licensed doctor of osteopathy and was board certified in anesthesiology. Prior to his arrest, Defendant practiced at Central Iowa Hospital Corporation, doing business as Iowa Health Pain Management Clinic. On December 27, 2011 Defendant received notice from the Iowa Board of Medicine (the "Board") that a formal investigation was underway regarding his pain management practices with respect to his patient Robert A. Dabb. The Board issued several other notices that a formal investigation was underway with respect to other patients throughout 2012. On January 1, 2012 Investigator James Machamer of the Board notified Troy J. Wolff, criminal investigator for the Iowa Department of Inspections and Appeals, of Defendant's practices, and Investigator Wolff began a criminal investigation. On February 2, 2012 Defendant voluntarily took a leave of absence from his practice.

In July of 2012, a peer review of Defendant's pain management practices was performed.

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On August 23, 2012 the Board issued a Statement of Charges, charging Defendant with professional incompetency, inappropriate prescribing, improper pain management, and unethical or unprofessional conduct. On September 5, 2012 Defendant was charged with involuntary manslaughter for deaths that occurred relating to Defendant's medical care. On October 8, 2012 the State filed a Trial Information charging Defendant with ten counts of involuntary manslaughter. On November 29, 2012 a Trial Information Amended and Substituted was filed on the ten counts of involuntary manslaughter for the deaths of Jeffrey Johnson, Loretta Fae Brown, Frederick Pritchard, Carla Davis, Lisa Cronkwright, Jason Spong, Brandi Stoutenberg, Chad Martin, Paul Gray, and Kim Krutsinger. The Board ordered another peer review of Defendant's pain management practices, which took place in November and December of 2012.

Defendant moved for the State to furnish a bill of particulars specifying his alleged conduct that violated Iowa Code section 707.5. On December 14, 2012 the Court ordered the State to issue a bill of particulars setting forth the specific acts of Defendant that the State will rely on to support the above-stated charges. The State filed a bill of particulars on March 1, 2013. On June 17, 2013 Defendant moved to dismiss the charges against him. Defendant asserts that 1) the State violated his constitutional rights in bringing these charges, and 2) the bill of particulars fails to set forth sufficient facts to bring charges against him or sustain a conviction on those charges. The State resisted Defendant's motion. At a hearing on August 22, 2013 the Court heard arguments from both Parties.

II. STANDARD OF REVIEW

Rule 2.11(6) of the Iowa Rules of Criminal Procedure governs motions to dismiss trial information's and indictments. The rule provides:

> If it appears from the indictment or information and the minutes of evidence that the particulars stated do not constitute the offense charged in the

> indictment or information, or that the defendant did not commit that offense or that a prosecution for that offense is barred by the statute of limitations, the court may and on motion of the defendant shall dismiss the indictment or information unless the prosecuting attorney shall furnish a bill of particulars which so states the particulars as to cure the defect.

Iowa R. Crim. Pro. 2.11(6). When considering a motion to dismiss a charge asserted in a trial information, a court will "accept as true the facts the State has alleged in the trial information and attached minutes." *State v. Johnson*, 528 N.W.2d 638, 640 (Iowa 1995); *see also State v. Gonzalez*, 718 N.W.2d 304, 307 (Iowa 2006) ("We accept the facts alleged by the State in the trial information and attached minutes as true."). A court should deny a motion to dismiss a criminal charge "if the facts the State has alleged charge a crime as a matter of law." *Johnson*, 528 N.W.2d at 640. "The issue before the district court [is] whether the facts set forth in the trial information[,] minutes of evidence[, and bill of particulars] could constitute the crime" Defendant was charged with; in other words, the State need not prove its case at this juncture—it need only provide the Court with sufficient facts demonstrating that Defendant committed the crime in question, involuntary manslaughter, as a matter of law. *See State v. Majeres*, No. 01-1805, 2002 WL 31031048, at *2 (Iowa Ct. App., Sept. 11).

"Where a court finds that the trial information and minutes of testimony adequately inform the defendant of the charge *and the facts to support the charge*, the court would have no ground to dismiss the information." *State v. Jackson*, 787 N.W.2d 480 (table), 2010 WL 2598369, at *2 (Iowa Ct. App.) (emphasis added). It is the State's burden, then, to provide the Court with a factual basis for each element of the crime charged. *See State v. Vornbrock*, 728 N.W.2d 225 (table), 2006 WL 3615010, at *2 (Iowa Ct. App.) (discussing each element of unlawful possession of marijuana on a motion to dismiss an unlawful possession charge and concluding that "[t]hough scant, the facts . . . could, as the State argues, conceivably constitute

the offense charged."). Not before the Court is whether there is sufficient evidence to ultimately convict Defendant beyond a reasonable doubt. *State v. Doss*, 355 N.W.2d 874 (Iowa 1984).

A court may also grant a motion to dismiss a charge notwithstanding compliance with Rule 2.11(6) where there has been a violation of the Iowa Rules of Criminal Procedure or the United States or Iowa Constitutions. *See State v. Hall*, 235 N.W.2d 702, 711–12 (Iowa 1975) (recognizing that the only grounds on which an indictment may be set aside are a violation of then-sections 776.1 and 773.6 of the Iowa Code (now Iowa Rules of Criminal Procedure 2.11(5)–(6)), and where there are violations of a defendant's constitutional right to due process and equal protection under the Fourteenth Amendment). With respect to constitutional challenges to statutes,

> we must remember that statutes are cloaked with a presumption of constitutionality. The challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt. The challenger is required to refute all reasonable bases upon which the statute could be declared constitutional. If the statute may be construed in more than one way, one of which is constitutional, we will adopt such a construction.

Gonzalez, 718 N.W.2d at 307 (internal citations and quotation marks omitted).

Defendant argues that the charges should be dismissed because 1) the government violated his constitutional rights and the Iowa Rules of Criminal Procedure, and 2) that the evidence is insufficient as a matter of law to continue prosecution. The Court considers each of these two categories of Defendant's motion separately.

III. PROCEDURAL CHALLENGES

A. Peer Review Evidence

Defendant first argues that the Court should dismiss this case because it was initiated based on illegally obtained evidence in violation of Iowa Code section 272C.6(4). As a result, the State's case is "corrupted by this illegal conduct," denying Defendant of his constitutional

protections. Def.'s Brief at 14. Defendant does not specify which of his constitutional protections the State violated by relying on the peer review evidence in bringing charges against him. Defendant's motion is more properly interpreted by the Court as challenging the State's compliance with Iowa Rule of Criminal Procedure 2.5. The question before the Court, then, is whether the State's use of the allegedly illegally obtained peer review information violated Rule 2.5, therefore warranting dismissal of the charges.

Although not apparent from his brief, Defendant appears to be making two arguments for dismissal of the charges: 1) that the State obtained the peer review evidence illegally in violation of 272C.6(4) and thus may not rely on it to bring charges against Defendant, and 2) the State's use of the peer review evidence to bring charges against Defendant violates Iowa code section 272C.6(4). The Court considers each argument in turn.

i. The Peer Review Evidence was Not Obtained in Violation of Iowa Code § 272C.6(4)

Defendant argues that disclosure of peer review information to law enforcement is only appropriate *after* the Iowa Board of Medicine issues a statement of charges and *only if* that statement indicates a crime has been committed. Defendant relies on *Doe v. Iowa State Bd. of Physical Therapy Exam'rs ("Doe I")*, 320 N.W.2d 557 (Iowa 1982) for this proposition. Iowa Code section 272C.6(4) provides:

> In order to assure a free flow of information for accomplishing the purposes of this section, and notwithstanding section 622.10, all complaint files, investigation files, other investigation reports, and other investigative information in the possession of a licensing board or peer review committee acting under the authority of a licensing board or its employees or agents which relates to licensee discipline are privileged and confidential, and are not subject to discovery, subpoena, or other means of legal compulsion for their release to a person other than the licensee and the boards, their employees and agents involved in licensee discipline, *and are not admissible in evidence in a judicial or administrative proceeding other than the proceeding involving licensee discipline*. . . . If the investigative information in the possession of a licensing board or its employees

> or agents *indicates a crime has been committed, the information shall be reported to the proper law enforcement agency.*

(emphasis added).

Defendant misinterprets and misunderstands the disclosure exception under section 272C.6(4) and misapplies the court's reasoning in *Doe I*. In *Doe I*, a physical therapist sought the name of an individual who filed a complaint against her with the Iowa State Board of Physical Therapy and Occupational Therapy Examiners. *Doe I*, 320 N.W.2d at 558. The board refused to release the name of the complainant because no formal disciplinary proceeding had yet begun, and the district court granted the board's motion to dismiss. *Id.* The Iowa Supreme Court affirmed the district court; it held that it was "obvious from the context, stated purpose and language of section 258A.6, [now Iowa Code section 272C.6(4)], that the disclosure exception applies only when a *disciplinary* proceeding has been initiated." *Id.* at 460 (emphasis added). In sum, the Court held that the board did not have to release information about the complaint to the physical therapist in question because the board itself had not yet started a formal disciplinary proceeding against her.

Doe I is distinguishable from this case for many reasons. The Iowa Code was amended in 1982 following the *Doe I* decision. Prior to its amendment, the section in question contained no provision requiring members of a board to report information to law enforcement if the information indicates a crime has been committed. *Compare* Iowa Code § 258A.6(4) (1981) *with* Iowa Code § 272C.6(4) (2013). Thus, the Court's reasoning in *Doe I*—which limited disclosure of information to *licensees* prior to a *disciplinary* proceeding—cannot be directly applied here, where the recipient of the information is law enforcement. It is clear from the decision that what the *Doe I* Court found "obvious" was the potential for pre-disciplinary hearing disclosure to licensees to "chill[the] willingness of citizens to make complaints," thereby "exalt[ing] a private

interest over the public interest." *Doe*, 320 N.W.2d at 560.

That concern is not present where the information is disclosed to law enforcement for the purpose of investigating whether the licensee may have committed a crime. If anything, allowing a licensing board to submit information of a peer review to law enforcement reinforces the public's interest in "ensuring competency in the medical profession." *Doe v. Iowa Bd. of Med. Exam'rs ("Doe II")*, 733 N.W.2d 705, 712 (Iowa 2007). In *Doe II*, the Iowa Supreme Court made clear that the legislature did not intend a "narrow reading" of the 1982 amendment dealing with disclosure of investigative information to other states' licensing boards. *Id.* at 710. The Court reaffirmed its conclusion in *Doe I* "that all complaint files and investigative information relate to licensee discipline regardless of whether that information leads to the filing of formal disciplinary charges." *Id.* Accordingly, the Court held that the board's disclosure of investigative information to another state's licensing board *prior* to the commencement of disciplinary proceedings did not violate section 272C.6(4).

The Court reconciled its holding in *Doe II* with its holding in *Doe I* by relying on the plain language of section 272C.6(4):

> This conclusion is consistent with our holding in [*Doe I*] that information relating to licensee discipline may only be disclosed to the licensee after formal disciplinary proceedings have been initiated. The legislature limited the disclosure exception at issue in [*Doe I*] in the timing of disclosure and to whom disclosure was allowed. *By requiring that the licensee be "involved in licensee discipline"* and that the information be disclosed only in proceedings "involving licensee discipline," the legislature was protecting the identity of the complainant and ensuring the free flow of information for complaint and investigative purposes. *The legislature did not include similar limiting language in the exception at issue in the present case.*

Doe II, 733 N.W.2d at 710–11 (emphasis added). Similarly, the exception that allows disclosure to law enforcement contains no limitation that the licensee be "involved in licensee discipline." Thus, the Court finds no support for Defendant's assertion that disclosure may only be made to

law enforcement once the board has issued a statement of charges indicating the subject of the review has engaged in criminal activity.

While there is no Iowa case law on point, the Arizona Court of Appeals recently reached a similar conclusion. In *State ex rel. Thomas v. Ditsworth*, 166 P.3d 130 (Ariz. Ct. App. 2007), the defendant—a physician charged with various counts of sexual assault—moved to set aside his indictment on the grounds that the prosecution violated his due process rights by allowing the grand jury to consider statements he made during a peer review performed by the Arizona Medical Board. 166 P.3d at 132. The statute at issue is substantially similar to Iowa Code section 272C.6(4). In 1982, the same year Iowa amended its peer review statute, Arizona also amended its peer review statute to incorporate a mandatory reporting requirement. *Id.* at 132. The amendment provides that "[i]f the board, during the course of any investigation, determines that a criminal violation may have occurred involving the delivery of health care, it shall make the evidence of violations available to the appropriate criminal justice agency for its consideration." *Id.* at 133 (quoting A.R.S. § 32-1451(O) (2012)).

The court rejected the defendant's argument that the statute was a "mere notice requirement," and held that "the nondisclosure provisions . . . do not apply when the Board 'determines that a criminal violation may have occurred involving the delivery of health care.'" *Id.* at 133–34 (quoting A.R.S. § 32-1451(O)). Pertinent to the court's reasoning was the legislature's stated goal of passing the statute to "more effectively protect the public health, safety, and welfare." *Id.* at 133 (quoting 1982 Ariz. Sess. Laws, ch 270, § 1). This rationale is persuasive, as the Iowa Supreme Court recognized in *Doe II*, and the Court adopts that reasoning here, where a licensing board provides law enforcement with information from a section 272C.6 hearing. Thus, the Court finds that the board did not violate Iowa Code section 262C.6(4) by

reporting the contents of the peer review of Defendant to law enforcement during the investigatory phase of the disciplinary proceeding, and further that the State has not obtained the peer review information in this case illegally.

ii. The State's Use of the Peer Review Evidence in Bringing Charges Against Defendant did Not Violate Iowa Code § 272C.6(4)

Defendant further argues that the State violated Iowa Code section 272C.6(4) by relying on the peer review evidence in bringing charges against him. Defendant points to section 272C.6(4), which expressly states that "all complaint files, investigation files, other investigation reports, and other investigative information" obtained in connection with a section 272C.6 hearing "are not admissible in evidence in a judicial or administrative proceeding other than the proceeding involving licensee discipline." The State resists, reiterating the longstanding rule under Iowa law that "a motion that merely challenges the sufficiency of the evidence supporting an indictment [or information] is not a ground for setting [it] aside." *State v. Doss*, 355 N.W.2d 874, 880 (Iowa 1984).

The question is not simply extinguished by *Doss*. The Court's holding in *Doss* was in response to the defendant's argument that, given the evidence presented by the State, there was insufficient evidence as a matter of law that there was probable cause to arrest him. *Id.* at 880. In other words, Doss was merely a straightforward motion to dismiss pursuant to Iowa Rule of Criminal Procedure 2.11(6). Here, Defendant is not only attacking the sufficiency of the evidence, but argues separately that the entire factual basis of the State's case rests on evidence that Defendant alleges was used in violation of Iowa Code section 272C.6(4).

a. Inadmissibility Under 272C.6(4)

Before the Court is an issue of statutory construction: does Iowa Code section 272C.6(4) permit the use of evidence obtained in connection with a section 272C.6 hearing for the purpose

initiating a criminal investigation?

> The purpose of statutory interpretation is to determine the legislature's intent. We give words their ordinary and common meaning by considering the context within which they are used, absent a statutory definition or an established meaning in the law. We also consider the legislative history of a statute, including prior enactments, when ascertaining legislative intent. When we interpret a statute, we assess the statute in its entirety, not just isolated words or phrases. We may not extend, enlarge, or otherwise change the meaning of a statute under the guise of construction.

State v. Romer, 832 N.W.2d 169, 176 (Iowa 2013) (internal citations and quotation marks omitted). A court should also "avoid strained, impractical, or absurd results." *Renda v. Iowa Civil Rights Com'n*, 784 N.W.2d 8, 15 (Iowa 2010). Several factors persuade the Court to conclude that Iowa Code section 272C.6(4) does not prohibit the State from *using* information obtained from a section 272C.6 hearing to initiate a criminal investigation; the statute only prevents the State from *admitting into evidence* at trial any documents or records obtained from a board relating to a 272C.6 hearing.

If the Court considers the plain text of section 272C.6(4), it states that the information in question is "not admissible in evidence in a judicial or administrative proceeding." Contrary to what Defendant asserts, then, the language of the statute does not prohibit *using* the information bar none; the State may not, however, have it *admitted into evidence*. This interpretation is consistent with the legislature's intent when it amended section 272C.6(4) to include the reporting requirement. It would be "impractical" and "absurd" to require a professional licensing board to divulge otherwise confidential information to law enforcement, and then prohibit law enforcement from relying on that information to bring charges against a licensee where the evidence establishes probable cause that he committed a crime.

However, it makes complete sense to prevent the State from simply admitting that information into evidence. The State must conduct its own criminal investigation—even if based

off of the information obtained from the licensing board—and may not merely rely on the peer review information as substantive evidence in prosecuting the licensee. The statute ensures this by explicitly making that information privileged and confidential, and therefore inadmissible as evidence absent any waiver of that privilege by the licensee. Accordingly, the Court finds that the State's use of the peer review evidence in bringing charges against Defendant did not violate Iowa Code section 272C.6(4).

b. Privilege

Intertwined with his argument concerning the prohibition on admissibility under section 272C.6, Defendant argues separately that the State may not rely on the peer review evidence in bringing charges against him because it is privileged and confidential. However, Defendant cites no authority to suggest that the State is prohibited from using privileged information in bringing charges, such as through a trial information. The Court also finds that the State's use of this information, although protected as privileged under section 272C.6(4), was proper.

"When an asserted privilege is based on a statute, the terms of the statute define the reach of the privilege." *Carolan v. Hill*, 552 N.W.2d 882, 886 (Iowa 1996). The *Ditsworth* court did not reach the issue of whether the privileged peer review evidence, while obtained legally, would be admissible in a grand jury proceeding.

Courts routinely consider evidence at the investigatory and pre-trial stages of a case that may otherwise be inadmissible at trial. For example, the Iowa Rules of Criminal Procedure explicitly permit the use of hearsay testimony to establish probable cause in the context of preliminary hearings. *See* Iowa R. Crim. Pro. 2.2(4)(b). The same is true for substantiating probable cause in a search warrant, such as through the use of informant statements. *See State v. Hoskins*, 711 N.W.2d 720, 727 (Iowa 2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)

for the proposition that "hearsay" evidence may establish probable cause, and relying on an officer's hearsay statements about an informant to find probable cause). Inadmissible police reports are routinely used to bring charges against defendants. The fact that the peer review would merely be inadmissible in evidence at trial, then, is an insufficient reason to conclude that an information using that evidence must be set aside.

The Court has found no authority for Defendant's assertion that his constitutional rights were violated because the trial information used to indict him contained privileged information. As the Court discusses below, even if any reference to the peer review evidence in this case were removed from the trail information, minutes of testimony, and bill of particulars, the State still has provided sufficient evidence to allow certain charges to proceed. The Court finds that the State's utilization of and reference to the peer review evidence in the Trial Information, Minutes of Testimony, and Bill of Particulars in this case does not warrant setting aside the charges against him.

B. Parallel Investigations

Defendant next argues that the State held concurrent civil and criminal investigations of the same conduct in violation of his constitutional rights under the Fourth and Fifth Amendments to the United States and Iowa Constitutions. Def.'s Brief at 11. Defendant provides no basis whatsoever for claiming that his Fourth Amendment rights have been violated, and does not specify which of his Fifth Amendment rights have been violated. The Court assumes from his brief that Defendant is arguing that these "parallel investigations" deprived him of due process of law under the Fifth Amendment.

Specifically, Defendant argues that the criminal investigation and the Iowa Board of Medicine investigation overlapped by approximately eight months. Def.'s Brief at 11. Defendant

notes that the Iowa Board of Medicine informed law enforcement of his actions long before the peer reviews were even conducted, and that at several points during the Board's investigation, he was interviewed by law enforcement concerning the same conduct under review by the Board. Def.'s Brief at 12. Defendant concludes that, because he was never informed that these interviews were being conducted by law enforcement, or that any criminal investigation of his actions was underway, the State violated his constitutional rights.

Defendant fails to demonstrate that the State's actions in this case amount to a violation of his due process rights. None of the authorities Defendant cites are persuasive. The court in *United States v. Rand*, 308 F. Supp. 1231, 1235 (N.D. Oh. 1970) dismissed a criminal indictment where the defendants were reassured that no criminal proceeding would ensue as a result of a civil investigation, and that, if one did, they would have full immunity from prosecution. The court reasoned, though, that the mere "failure to appraise [a] defendant of the contemplated criminal proceeding" would simply make inadmissible in the criminal proceeding any evidence obtained in the civil proceeding. *Id.* It would not, however, warrant dismissing the charges altogether.

United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991) did not involve parallel civil and criminal investigations; it dealt with the much more serious concern of entrapment and "outrageous government conduct." The dangers posed by entrapment and outrageous conduct are great. Here, the Defendant had already committed the alleged crimes; the government was merely investigating what had already been done. In the context of entrapment, though, the government coerces an individual to engage in criminal activity. Importantly, the Court in *Smith* held that "encouraging 18-year-old patients in drug-treatment centers to deal drugs . . . does not rise to the level of outrageous conduct necessary to constitute a due process violation." *Id.* The

Smith court makes clear that the bar for outrageous government conduct is a high one. The Court is not convinced that conducting a criminal investigation, even if under the guise of a civil investigation, without informing the target of that investigation, constitutes "outrageous government conduct."

United States v. Tweel, 550 F.2d 297, 298 (5th Cir. 1977) dealt with an audit by the Internal Revenue Service conducted at the specific request of the Organized Crime and Racketeering Section of the Department of Justice. The defendant did not move to dismiss the charges against him; rather, he moved to suppress evidence obtained during that audit because he was not told of the criminal nature of the investigation. *Id.* A motion to suppress information obtained in violation of the Fourth and Fifth Amendments and a motion to dismiss are different motions. Thus, *Tweel* is of no help to Defendant here. The same is true with respect to *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993), another case where the defendant moved to suppress evidence obtained from a criminal investigation "under the guise of a civil tax audit."

Defendant does not ask this Court to suppress evidence obtained in violation of his Miranda rights under the self-incrimination clause of the Fifth Amendment; he seeks dismissal of the indictment in its entirety on, presumably, due process grounds. As the cases he cites make clear, however, the State did not violate Defendant's Fifth Amendment due process rights by failing to inform him that a criminal investigation was underway. Even if Defendant was claiming his Fifth Amendment Miranda rights were violated, the Court would not dismiss the indictment on that basis alone—he would have to show that, absent the illegally obtained information, the State cannot meet its burden under Iowa Rule of Criminal Procedure 2.11(6).[1] Defendant has failed to timely file a motion to suppress in this case. Accordingly, the Court only considers Defendant's due process claim, and denies Defendant's motion to dismiss his

[1] The Court makes no determination at this time whether the State violated Defendant's Miranda rights.

indictment on these grounds.

C. Physician–Patient Relationship

Defendant also argues that "[b]ecause the alleged deficiencies in care occurred within the physician/patient relationship, the appropriate remedy, if any, is before the [Iowa Board of Medicine] or a civil lawsuit—not a criminal proceeding." Def.'s Brief at 35. Defendant appears to be arguing before the Court that a doctor who commits a crime under Iowa law related to the care of his patients is immune from criminal prosecution. Defendant argues that "[t]he legislature by its plain language did not intend to subject physicians or other medical professionals to criminal liability due to their work as medical providers," citing Iowa Code section 707.5(2), the involuntary manslaughter provision, for support. Def.'s Brief at 35–36.

Criminal laws are not profession-specific. If a doctor, in providing medical care, commits a crime, he may be prosecuted for that crime to the same extent as any other person. The same is true whether he was a doctor or a police officer, or fireman—a person may commit a crime if his conduct is reckless, even if it was performed in the course of his duties as a professional or public servant. Of course, whether a crime was actually committed in this case is for the jury to decide. But the State may bring criminal charges against a physician if the evidence establishes probable cause that he committed a crime, even if the line separating civil negligence from criminal recklessness is a fine one. If the State's evidence is ultimately insufficient to continue prosecution, the charges will be dismissed; but Defendant's constitutional rights have not necessarily been violated.

The Court therefore denies Defendant's motion to dismiss merely because the alleged offense he committed occurred within the context of the physician–patient relationship.

D. Void for Vagueness

Defendant further argues that Iowa Code section 707.5(2) is void for vagueness because it fails to put him on notice of what conduct is proscribed, and that therefore the charges against him must be dismissed.

> Vague statutes are proscribed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In order to avoid a vagueness problem, a penal statute must 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. If a statute lacks clearly defined prohibitions, then it is void for vagueness. The void-for-vagueness doctrine protects the following values:
>
> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . . . Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'
>
> Due process requires a standard of conduct be reasonably ascertainable 'by reference to prior judicial decisions, similar statutes, the dictionary, or common generally accepted usage.'

Gonzalez, 718 N.W.2d at 309–10 (internal citations and quotation marks omitted). Iowa courts consider "the federal and [Iowa] due process clauses to be 'identical in scope, import, and purpose,'" and therefore the Court "will treat the provisions as identical." *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007) (quoting *In re Guardianship of Hedin*, 528 N.W.2d 567, 575 (Iowa 1995)). Iowa courts further employ an "avoidance theory in the context of due process challenges to legislative acts," which "presumes the statute is constitutional and gives any reasonable construction to uphold it." *Id.* (internal quotation marks omitted). In assessing a vagueness claim, a court "must . . . examine the statute 'on its face.' In doing so we consider whether [the defendant's] conduct clearly falls within the proscription of the statute under any construction. The fact the statute may be vague as applied to other factual scenarios is irrelevant

to this analysis." *State v. Dalton*, 674 N.W.2d 111, 121 (Iowa 2004) (quoting *State v. Hunter*, 550 N.W.2d 460, 465 (Iowa 1996)).

The Court is not persuaded that section 707.5(2) is unconstitutionally vague. Defendant refers to the statement of Dr. Gordon Beardwood, a witness for the State, to support his argument. Dr. Beardwood expressed uncertainty as to where he would draw the line between appropriate prescribing and over-prescribing. Def.'s Brief at 36. Defendant concludes that this uncertainty fails to put physicians on notice that their patient care practices may constitute crimes. Def.'s Brief at 36–37.

Defendant misapplies the void-for-vagueness doctrine. "The United States Supreme Court has repeatedly made clear that vagueness challenges are determined *on the basis of statutes and pertinent case law rather than the subjective expectations of particular defendants based on incomplete legal knowledge*." *Nail*, 743 N.W.2d at 540 (emphasis added). In other words, section 707.5 is not vague merely because a member of the public would not be *aware* that a specific unintentional act she commits, which leads to the death of another, is itself illegal. Rather, section 707.5 puts her on notice that *if* she acts unintentionally, and that act causes the death of another, she has committed a crime. If the Court accepts Defendant's argument, then for *any* defendant to be charged for the death of another due to her unintentional act, the Iowa Code would have to explicate the limitless possible unintentional acts that one could commit. This is clearly not what the vagueness doctrine requires.[2]

What Defendant instead challenges is whether he acted with the requisite *mens rea*—a question of fact for the jury to decide. That section 707.5(2) does not contain an explicit *mens*

[2] For example, see *State v. Torres*, 495 N.W.2d 678, 682 (Iowa 1993). In *Torres*, the Iowa Supreme Court considered whether the act of "sweeping [a] lamp off the table" which shattered and fatally wounded the victim was a "reckless act" sufficient to sustain a charge of involuntary manslaughter. *See id.* The Court ultimately held that it was not in that case, *id.*; but clearly, the Court still considered whether such an act *could* sustain a conviction for involuntary manslaughter, even if sweeping a lamp off of a table was not specifically contemplated by the legislature, and that doing so may not always amount to criminal recklessness.

rea term aside from "unintentional" does not render it unconstitutionally vague. Iowa precedent, which the vagueness doctrine commands the Court to consider, makes clear that the requisite *mens rea* for involuntary manslaughter is recklessness:

> One essential element of involuntary manslaughter is that the underlying offense or act be committed in a reckless manner. Recklessness is conduct that shows a willful or wanton disregard for the safety of others. It is ordinarily conscious and intentional, and involves an unreasonable risk of harm to others which is or should be known to the offender.

State v. Rohm, 609 N.W.2d 504, 511 (Iowa 2000) (internal citations omitted). Defendant is asserting that his conduct in this case was not reckless. It is immaterial if Defendant knew whether or not that his specific conduct, if it led to the death of another, was illegal; it is only relevant that he was on notice that an unintentional, reckless act that causes the death of another constitutes a crime. Whether his actions were reckless in this case is not for the Court to decide at this time.

For those reasons, the Court finds that Iowa Code section 707.5(2) is not void for vagueness because it sufficiently puts the public on notice that an unintentional, reckless act which leads to the death of another is a punishable criminal offense. Accordingly, the Court denies Defendant's motion to dismiss on these grounds.

IV. RULE 2.11(6) CHALLENGES

Having determined that none of the procedural claims Defendant has raised warrant dismissing the charges against him, the Court next considers his challenges under Iowa Rule of Criminal Procedure 2.11(6). Defendant argues that the State has failed to provide facts that, if taken as true, establish that he committed the crimes alleged, and that the charges against him must be dismissed as a matter of law. The Court will consider only those facts from the State's Trail Information, Minutes of Testimony, and Bill of Particulars. Where the State's facts

conflicted or were incomplete, the Court noted the discrepancy and attempted to construe the facts in favor of the State.

A. Elements of Involuntary Manslaughter Under Iowa Code § 707.5

To survive Defendant's motion, the State must show that, if all facts are taken as true, Defendant has committed involuntary manslaughter under Iowa Code section 707.5 as a matter of law. Specifically, Defendant was charged under subsection 2 of Iowa Code Section 707.5, which provides: "A person commits an aggravated misdemeanor when the person unintentionally causes the death of another person by the commission of an act in a manner likely to cause death or serious injury." Section 707.5(2) therefore requires: 1) that "there must be some evidence of [an] 'act' . . . other than a public offense," *State v. Royer*, 436 N.W.2d 637, 643 (Iowa 1989); see also *State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992) ("[w]e have defined the word 'act' in Iowa Code section 707.5(2) as an act which is not a public offense. This is in contrast with involuntary manslaughter under section 707.5(1), a class 'D' felony, which requires the act be a public offense."); which 2) "caus[ed] the death," *Royer*, 436 N.W.2d at 643; and 3) that the defendant committed that act recklessly, *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993) ("recklessness, though not mentioned in the statute, is nevertheless an additional element that must be proven to sustain a conviction for involuntary manslaughter.").

In sum, the State must provide facts which, if taken as true, show that Defendant has acted recklessly, and that that reckless act caused the victims' death. As stated above, the act can be any act other than a public offense. Under Iowa law, "recklessness" means:

> either a willful or wanton disregard for the safety of others. Ordinarily, such conduct should be conscious and intentional, creating an unreasonable risk of harm to others, where such risk is or should be known to defendants. . . . Simply put, for recklessness to exist the act must be fraught with a high degree of danger. In addition the danger must be so obvious from the facts that the actor knows or should reasonably foresee that harm will probably-that is, more likely than not-

flow from the act.

Torres, 495 N.W.2d at 681. With respect to causation:

> It is well established that the definition of "proximate cause" in criminal cases is much the same as its definition in civil cases. Generally, a defendant's conduct is the proximate cause of injury or death to another if (1) his conduct is a "substantial factor" in bringing about the harm and (2) there is no other rule of law relieving the defendant of liability because of the manner in which his conduct resulted in the harm. Proximate cause is based on the concept of foreseeability.
>
> When conduct or forces occur after a defendant's conduct, the defendant may be relieved of criminal responsibility if the intervening events break the chain of causal connections between the defendant's conduct and the victim's death. In order to relieve the actor of responsibility, the intervening event must be the superseding cause of harm. However, responsibility for criminal acts cannot be escaped merely because other factors contributed to the injury or death, provided those factors were not the sole proximate cause of death.

State v. Travis, 497 N.W.2d 905, 908 (Iowa 1993) (internal citations omitted). While "[a] defendant need not actively participate in the immediate cause of death in order to be held criminally liable for causing the unintentional death of another[,] proximity to the harm is an important factor." *State v. Ayers*, 478 N.W.2d 606, 608 (Iowa 1991) (internal citations omitted). "Proximate cause issues are most often questions for the jury; only in exceptional cases can proximate cause be decided as a matter of law." *Id.*

B. Involuntary Manslaughter Case Law

There is no Iowa case law, and very little case law nationwide, dealing with the factual circumstances presented here: a doctor charged with involuntary manslaughter for patient care practices, including overprescribing. In its Resistance, the State relies on *State v. Hoon*, 815 N.W.2d 409 (Table), 2012 WL 836698 (Iowa Ct. App.) to support its argument that the "act" of supplying controlled substances to someone who then misuses them can constitute recklessness and be the cause of one's death sufficient to sustain a charge of involuntary manslaughter. In *Hoon*, the defendant, a recovering drug addict with a methadone prescription, supplied the

deceased, her niece, with some of her methadone pills. *Id.* at *1. The defendant knew the deceased had substance abuse problems and that she was high the day defendant gave her the pills. *Id.* at *4. The defendant's niece was found dead the next day, and her cause of death was determined to be a methadone overdose. *Id.* at *1. The defendant was charged with and convicted of involuntary manslaughter in violation of Iowa Code section 707.5(1) and appealed her conviction on the grounds that the State has failed to demonstrate that she was reckless or that her actions were the cause of her niece's death. *Id.* at *2.

While *Hoon* is informative, it is distinguishable from this case. Perhaps most importantly, *Hoon* was convicted under Iowa Code section 707.5(1); that is, her "act"—delivery of a controlled substance—was a public offense under Iowa Code section 124.401(1)(c). This fact was central to the court's reasoning in *Hoon*:

> We can reasonably infer that the legislature criminalized the delivery of controlled substances like methadone because such potent drugs may produce devastating effects on bodily functions, *especially for people who do not have a doctor's approval for taking them.* The reasons for holding Hoon criminally liable for the delivery in the first place *encompassed the same risks that resulted in [the decedent's] fatal overdose.*

Id. at *6 (emphasis added). This does not alter the overall question of whether one's act was reckless; the key inquiry remains "whether [one's] conduct was fraught with such a high degree of danger that she knew or should have foreseen that harm would flow from it." *Id.* at *4. However, it is clear that the court believed it was *more* reckless for *Hoon* to give "potent drugs" to an addict without a prescription than, say, if *Hoon* had given her niece some methadone pills where her niece already had a prescription for methadone.

In short, *Hoon* does not directly translate to all of the counts against Defendant here. The mere fact that Defendant was involved in caring for these patients is not enough to sustain a charge of involuntary manslaughter at this stage; the State must demonstrate facts showing he

did so recklessly, and that his recklessness *caused* the victims' death.

C. Vicarious Liability for Involuntary Manslaughter

In its Resistance, the State makes note that it "charges the defendant individually, by joint criminal conduct, or by aiding and abetting another." State's Brief at 6. In other words, the State has charged Defendant for involuntary manslaughter both principally and vicariously. *See State v. McFadden*, 320 N.W.2d 608, 610 (Iowa 1982) (explaining that "aiding and abetting and joint criminal conduct are theories of vicarious liability," and that an individual may be held vicariously liable for the crime of involuntary manslaughter for acts committed by another person). To sustain a theory of vicarious liability, however, the State must show that both the principal and actor fall within the requirements of Iowa Code section 707.5(2). *See id.* (finding that a theory of vicarious liability alone could not sustain a charge of involuntary manslaughter where the deceased killed himself and section 707.5 requires the killing of "another"). To survive a motion to dismiss on these specific charges, therefore, the State must provide facts from which the Court could conclude that *both* the principal and actor have committed involuntary manslaughter as a matter of law.

D. Individual Counts of Involuntary Manslaughter

Because each specific charge involves facts unique to each victim, the Court considers each count individually.

i. Count I: Jeffrey Johnson

Jeffrey Johnson began seeing Defendant on January 4, 2012 for pain management related to injuries sustained from a motorcycle accident. While not stated explicitly in the Bill of Particulars or Minutes of Testimony, it appears Defendant prescribed Johnson fentanyl prior to taking leave. On February 2, 2012 Defendant took leave from his practice. Advanced Registered

Nurse Practitioner ("ARNP") Karen Mellody, who worked under Defendant, continued the prescription for fentanyl, discontinued Johnson's prescription for nucynta, and added a prescription for morphine sulfate and hydrocodone.

According to the State, ARNP Mellody renewed Johnson's prescription for fentanyl, this time at a higher dose of 100 mcg/hr.[3] Johnson was found dead on May 26, 2012. The medical examiner opined that Johnson's death was due to acute fentanyl toxicity, and during an autopsy he discovered two fentanyl patches on Johnson's body. Johnson's wife claims that Johnson was confused about the specific levels of medications prescribed by Defendant he was supposed to take. Further, in March, Johnson displayed signs of mismanagement, having had a fentanyl patch fall off while swimming and requesting additional patches.

The State has provided facts sufficient to sustain a charge of involuntary manslaughter against Defendant as a matter of law for the death of Jeffrey Johnson. Defendant, by himself or vicariously through ARNP Mellody, prescribed Johnson fentanyl, an overdose of which ultimately caused his death, and a jury could conclude that this continuation of fentanyl given Johnson's mismanagement with the drug was reckless. Accordingly, Defendant's motion to dismiss Count I is denied.

ii. Count II: Loretta Fae Brown

Loretta Fae Brown began seeing Defendant on July 13, 2010 for pain management for lower back pain. At the time, Brown was a patient at a local methadone clinic, and Defendant instructed her to cease attending the clinic so that he could begin treatment.[4] Later, Defendant prescribed her methadone, at a higher rate than what she had taken previously, and gabapentin. In September of 2010, Brown was taking hydrocodone, methadone, gabapentin, and alprazolam,

[3] The Court notes that the State fails to provide the level at which Defendant prescribed Johnson fentanyl prior to this increase.

[4] It is unclear whether Brown ceased attending the methadone clinic at that time.

all prescribed by Defendant. On October 22, 2010 Brown tested positive for fentanyl, although Defendant did not prescribe Brown fentanyl, and did *not* test positive for hydrocodone or hydromorphone, which she was supposed to be taking. Brown's husband believed that Brown was using his fentanyl patches without a prescription. According to the State, Brown's husband contacted the clinic stating that Brown was disoriented, was falling asleep, and was losing control of her bladder, but she refused to go to the emergency room at the clinic's request.

Brown was hospitalized on November 17, 2010, after which Defendant apparently decreased doses of certain pain medications and started her on other medications. According to the State, Defendant never checked the PMP, and was therefore unaware that Brown had fentanyl in her system. Further, Brown reported overusing prescriptions and having difficulty managing her medications. Defendant continued to prescribe oxycodone and methadone for Brown over the next few weeks. By June 29, 2011 Brown was seeing Dr. Luepke for pain management who, after checking with the clinic about Brown as a patient, refilled her prescriptions. Brown was pronounced dead on July 20, 2011. The medical examiner's report listed "acute combined prescription drug toxicity" as the cause of death.

The State has provided facts sufficient to sustain a charge of involuntary manslaughter against Defendant as a matter of law for the death of Loretta Fae Brown. It could very well be that the prescription of these medications to Brown, over time, in conjunction with the fentanyl, caused her death, and that Defendant was reckless for giving Brown those prescriptions. If Defendant was aware of Brown's difficulty using prescriptions, and should have been aware that she was using fentanyl had he conducted the proper screening tests, and he continued to prescribe her medications regardless of these concerns, his actions may be "fraught with a high degree of danger" sufficient to constitute recklessness. Whether this is true must be determined

by the jury at trial, but the State has met its burden of providing a sufficient factual basis that Defendant committed involuntary manslaughter as a matter of law. Defendant's motion to dismiss Count II is therefore denied.

iii. Count III: Frederick Pritchard

Frederick Pritchard began seeing Defendant on January 26, 2011 seeking pain management for chronic lower back pain. Defendant switched Pritchard from hydrocodone to nucynta. Pritchard subsequently tested positive for oxymorphone and benzodiazepines. On April 14, 2011 Pritchard called Defendant threatening suicide by prescription medication. At that time Pritchard was committed to an institution for his mental illness. Pritchard continued taking nucynta while institutionalized per Defendant's instruction. During his commitment, other physicians took note of his abuse of opioids and benzodiazepines. Pritchard was released on April 26, 2011, and Defendant prescribed him a thirty-day supply of nucynta and agreed to closely monitor his treatment regimen. A month later on May 24, Defendant prescribed Pritchard a thirty-day supply of hydrocodone. Pritchard was found dead on May 29, 2011. His cause of death was determined to be acute hydrocodone toxicity.

Defendant first argues that this Count should be dismissed because the State failed to perform an autopsy of Pritchard's body pursuant to Iowa Administrative Code section 641-127.3(1). Section 641-127.3(1) demands that "[a] county medical examiner shall perform an autopsy or order that an autopsy be performed in . . . (a) [a]ll cases of homicide or suspected homicide[, and] (b) [a]ll cases in which the manner of death is undetermined." Defendant points to no authority to suggest that failure to comply with section 641-127(3) of the Iowa Administrative Code requires dismissal of criminal charges, and the Court finds none. Failure to perform an autopsy is not listed in Iowa Rule of Criminal Procedure 2.11 as an appropriate

reason to dismiss a criminal charge, nor has Defendant argued that the State's failure to autopsy Pritchard violated his constitutional rights. The Court therefore denies Defendant's motion on this basis.

The Court further finds that the State has provided a sufficient factual basis to charge Defendant with involuntary manslaughter as a matter of law for the death of Frederick Pritchard. Defendant was aware of Pritchard's suicidal ideation while on hydrocodone, he continued Pritchard on hydrocodone after his release from the institution, and hydrocodone was the cause of Pritchard's death. These facts are sufficient to sustain a charge of involuntary manslaughter, as they demonstrate that Defendant's acts which led to the death of his patient may have been reckless. Defendant's motion to dismiss Count III is therefore denied.

iv. Count IV: Carla Davis

Carla Davis began seeing Defendant in August 2010 who started her on pain medication. According to the State, Defendant was aware that Davis took street drugs in addition to her medications and that she had a history of violating "the agreements" with other physicians.[5] On January 24, 2011 Defendant prescribed Davis methadone and hydromorphone. Davis filled those prescriptions on February 19, 2011 and died less than a week later on February 25, 2011. At the scene of her death were various bottles of pills with most of the pills gone, including the prescription for hydromorphone. The medical examiner determined that her cause of death was acute combined prescription drug toxicity.

According to the Bill of Particulars, Minutes of Testimony, and Resistance, the State's theory of liability rests on very narrow grounds. In its brief, the State argues that Defendant should have been aware that in February 2011, Davis's family doctor prescribed Davis Xanax,

[5] The Court assumes that by "the agreements," the State is referring to agreements relating to her prescriptions for opioids that urge responsible use.

and that "[a]s an expert in pain management, [Defendant] should know that Xanax has a potentiating effect on opioid narcotic [*sic*], such as hydromorphone." State's Brief at 10. In the Minutes of Testimony, the State instead argued that it was the interaction between hydromorphone hydrochloride and methadone hydrochloride that could "increas[e] the risk of respiratory depression that might result in death." Minutes of Testimony at 18. This potential dangerous interaction is not mentioned in the Bill of Particulars. According to the State, Defendant should have known that Davis was prescribed Xanax which could potentially conflict with opiates, such as methadone, and that Defendant's prescription of methadone was reckless because both Xanax and methadone were present in Davis's system when she died, causing her death.

The Court finds that the State has provided sufficient facts to sustain a charge of involuntary manslaughter against Defendant as a matter of law for the death of Carla Davis. It may have been reckless for Defendant to prescribe Davis methadone given his knowledge of her difficulty adhering to prescription regimens, her illicit drug use, and that she was on other medications that could conflict with methadone. The State will, of course, have to prove all of this beyond a reasonable doubt at trial, but there are facts sufficient to charge involuntary manslaughter as a matter of law. Defendant's motion to dismiss Count IV is therefore denied.

v. Count V: Lisa Cronkwright

Lisa Cronkwright moved to Iowa from Arizona. While in Arizona, she had an intrathecal pain pump implanted near her spine which was used to distribute pain medication. Cronkwright's physician in Arizona prescribed her 40 mls of hydromorphone at a concentration of 5 mcg/ml, for a total daily dose of 3.998 mcg. Cronkwright saw Defendant on October 18, 2010 after her move to Iowa. Defendant apparently altered her hydromorphone prescription from 40 mls at a

concentration of 5 mcg/ml to 40 mls at a concentration of 10 *mg/ml*; that is, her actual prescription was for 10 *milligrams* (mg) of hydromorphone, not *micrograms* (mcg). The effect was to increase Cronkwright's daily dosage of hydromorphone from 3.998 mcg to 3,998.00 mcg—a thousand-fold increase in the amount of hydromorphone entering her system per dose. Cronkwright was found dead the next day after one dose from the pump was released into her body. The medical examiner determined the cause of her death to be hydromorphone overdose.

The Court finds that the State has provided a sufficient factual basis to support the charge of involuntary manslaughter against Defendant as a matter of law for the death of Lisa Cronkwright. The prescription for hydromorphone was prescribed by Defendant, who apparently mistakenly increased the dose by a factor of 1000, and Cronkwright was found dead the very next day resulting from a hydromorphone overdose. A jury could conclude from these facts that Defendant's error in prescribing hydromorphone was reckless and caused Cronkwright's death. Defendant's motion to dismiss Count V is denied.

vi. Count VI: Jason Spong

Jason Spong first saw Defendant on July 16, 2007 seeking pain management treatment for lower back pain. According to the State, Defendant never checked Spong's PMP nor did he review prior images of Spong's injuries or order new scripts for x-rays. Spong was treated with opioid therapy and injection therapy. Following another procedure, Defendant increased Spong's opioid prescription, and again doubled his daily opioid dose on November 13, 2007. Defendant also increased Spong's hydrocodone from 4 to 10 mg daily on January 9, 2008. The State asserts that at this time, Spong was also prescribed alprazolam from another physician. On July 3, 2008, Spong apparently informed Defendant that he had taken more hydrocodone than prescribed. Defendant responded by replacing Spong's hydrocodone with hydromorphone. Two weeks later,

Spong reported feeling dizzy, and Defendant prescribed him Percocet and refilled his prescription for hydrocodone. Apparently, Spong began taking hydromorphone again without a prescription in September 2008.

In 2009, Spong was hospitalized from June 15 to June 17 for respiratory failure and pneumonia, and was eventually diagnosed with hypercapnic respiratory failure. At that time, Spong tested positive for benzodiazepines, although none were prescribed. The State asserts that hypercapnea is associated with opioid and benzodiazepine toxicity, but Defendant never addressed this with Spong. The State next claims that on July 16, 2009 Defendant discontinued hydromorphone ("July 16, 2009 dilaudid," known by its generic name as hydromorphone, "was discontinued"), but the State never asserted that Defendant re-prescribed Spong hydromorphone save for the two-week span following July 3, 2008. Bill of Particulars at 7. Nonetheless, Defendant apparently continued Spong on hydrocodone and Percocet. On May 4, 2010, while Spong reported feeling benefits from certain procedures that were performed to alleviate his pain, he stated it did not help with long-term standing or sitting. Defendant prescribed Spong gabapentin and nucynta. According to the State, Spong did not wish to alter his pain medications any further, but Defendant prescribed him oxycodone on June 21, 2010. Defendant continued these prescriptions, and further increased Spong's dose of gabapentin. Spong died on September 16, 2010. The medical examiner determined his cause of death to be acute combined oxycodone and alprazolam intoxication.

The State has provided sufficient facts to support a charge of involuntary manslaughter against Defendant as a matter of law for the death of Jason Spong. Defendant was on notice that Spong took pharmaceuticals outside those that Defendant prescribed, and further knew or should have known that Spong's treatment had previously been terminated due to drug diversion or

misuse. A jury could conclude from these facts that Defendant recklessly prescribed oxycodone which resulted in Spong's death. Accordingly, Defendant's motion to dismiss Count VI is denied.

vii. Count VII: Brandi Stoutenberg

Brandi Stoutenberg had a history of substance abuse and prescription misuse, had overdosed on Xanax, and had on one occasion altered a prescription from twenty tablets to 120 tablets. Stoutenberg saw Defendant on September 7, 2010, where he prescribed her 120 4 mg tablets of hydromorphone and a forty-five day supply of gabapentin #30. While this was the only time Stoutenberg saw Defendant in his capacity as a physician, the State alleges the two were well acquainted prior to her visit. The State alleges that Defendant provided Stoutenberg with various pharmaceuticals without prescriptions, and further that he knew of Stoutenberg's history with prescription misuse and substance abuse. Stoutenberg died on September 11, 2010 from mixed drug intoxication (amphetamine and Alprazolam). Several medications were present at the scene of her death, including alprazolam, gabapentin, oxycodone, amphetamine salts, hydrocodone, hydromorphone, naproxen, and trazadone.

The fact that Brandi Stoutenberg died from medication not prescribed by the Defendant, while an important fact, is not dispositive in light of the contentions that the Defendant was giving Ms. Stoutenberg medication outside the confines of the typical doctor-patient prescription relationship. If a doctor provides medication outside the legally required practice of prescriptions, it undermines all doctor's ability to effectively and safely manage the care of their patients.

The facts and circumstances surrounding Brandi Stoutenberg's death create a jury questions on the charge of involuntary manslaughter. Therefore, the Defendant's motion to

dismiss Count VII is denied.

viii. Count VIII: Chad Martin

Chad Martin began seeing Defendant on August 10, 2010 complaining of pain in his neck and lower back. At the time, he was taking hydrocodone prescribed by Dr. Kono. Defendant prescribed Martin a refill of nucynta and started him on gabapentin. Martin still complained of pain. On October 8, 2010 his prescription was changed from nucynta to Percocet. ARNP Mellody refilled that prescription early, and later doubled the dose of gabapentin and renewed the prescription for oxycodone. She later prescribed Martin Kadian extended release. From that time until his death there were various changes and increases to Martin's prescription regimen. On September 6, 2011 Martin's alprazolam was refilled, and three days later he was prescribed oxycodone without an office visit. There was apparently a prescription filled for Percocet as well on September 15, 2011. Martin was found dead on September 16, 2011. While the State asserts in the Minutes of Testimony and Bill of Particulars that the cause of death was due to an overdose of prescription opiate medication, the State clarifies in its brief that Martin actually died from bilateral pulmonary emboli with acute oxycodone toxicity as a contributing factor.

The State has provided sufficient facts to support a charge of involuntary manslaughter against Defendant as a matter of law for the death of Chad Martin. As the State asserts, a contributing factor of Martin's death was overdose from oxycodone. Apparently, other physicians had documented that Martin was vomiting blood and noted it could have been attributed to excessive narcotics ingestion, and family members reported he was overusing his medications. Given these circumstances, a jury could find that Defendant's conduct was reckless and that the prescriptions caused the pulmonary embolism that led to Martin's death. Accordingly, Defendant's motion to dismiss Count VIII is denied.

ix. Count IX: Paul Gray

Paul Gray began seeing Defendant on December 27, 2005, where Defendant allegedly began treating Gray for his addiction to legal and illicit substances—not pain management. The Defendant is not certified as an alcohol or drug counselor. Gray had a history of drug use, abuse, and treatment, and a physical exam revealed signs of intravenous drug use. The Defendant's listed impression was "opioid addiction, active, mild early withdrawal." Bill of Particulars at 9. Defendant started Gray on subutex, and eventually switched him to subutone. Defendant referred Gray to a therapist, but Gray did not pursue therapy. On February 3, 2006 Gray reported having used fentanyl, heroin, and lortab. Defendant then prescribed Gray Ambien. The State alleges Gray was ingesting "90" Percocet per day[6] and admitted to ingesting the contents of fentanyl patches.

In August 2007, Defendant prescribed Gray Xanax and Defendant refilled the prescription several times without any in-office appointments. On February 15, 2008 Gray admitted to ingesting "60" Xanax and tested positive for benzodiazepines. Over the next few months Gray misused and overdosed on medications. More recently, Gray tested positive for fentanyl. The evidence clearly establishes that the Defendant was aware that Gray was a drug addict who consistently mismanaged his medication and supplemental prescribed medication with illegal and non-prescribed medication. Gray died on May 24, 2010 from acute combined fentanyl and morphine toxicity.

The State has established that the Defendant's long-term and continual inadequate and enabling treatment of Gray was conducted with apparent indifference and in a reckless manner. The Defendant was informed by many sources and had seen first-hand the extent of Mr. Grey's

[6] The State has failed to indicate if it was ninety pills or ninety milligrams. The Court assumes this is ninety milligrams, and not ninety pills.

drug dependency and his inaction as the only treating physician may be found by a jury as a direct and causal connection to Mr. Gray's death. Therefore, the Defendant's motion to dismiss Count IX is denied.

x. Count X: Kim Krutsinger

Kim Krutsinger saw the Defendant on December 7, 2010, but had previously seen Defendant while he was employed with Broadlawns Medical Center. Krutsinger apparently reported a history of using marijuana and methamphetamines. Defendant prescribed her methadone and oxycodone. Her mother reported to Defendant that she was misusing those medications and was receiving pharmaceuticals from sources other than Defendant. On February 4, 2011 Krutsinger tested positive for twice the prescribed amount of oxycodone, but the prescriptions continued to be refilled. Krutsinger died on September 20, 2011 of "dilated cardiomyopathy and lipomatous hypertrophy of atrial septum in setting of mixed drug intoxication." Bill of Particulars at 11. She tested positive for THC and citalopram as well as therapeutic levels of diazepam, methadone, and gabapentin.

The State has provided sufficient evidence to sustain a charge of involuntary manslaughter against Defendant for the death of Kim Krutsinger. According to the State, mixed drug intoxication was a factor leading to Krutsinger's death. Defendant was made aware of Krutsinger's illicit drug use, overuse of prescriptions, and difficulty managing medications. If construed in favor of the State, Defendant's continued prescription of pharmaceuticals, some of which were found in her system at her death, could have contributed to her death from mixed drug intoxication. Therefore, Defendant's motion to dismiss Count X is denied.

IT IS THE ORDER OF THE COURT Defendant's motion to dismiss is **DENIED.**

IT IS SO ORDERED this 21st day of October, 2013.

Gregory D. Brandt

Gregory D. Brandt, JUDGE
Fifth Judicial District of Iowa

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